

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

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:
BLUESTONE COAL CORP., et al., :
:
Plaintiffs, :
: Civil Action
v. : No. 2:16-cv-06098
:
PINNACLE MINING CO., LLC, et al., :
:
Defendants. :
:
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TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE HELD
BEFORE THE HONORABLE THOMAS E. JOHNSTON, CHIEF JUDGE
THURSDAY, APRIL 25, 2019, 2:00 P.M.

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APPEARANCES:
(All telephonically)

For the Plaintiffs: DAVID F. NELSON, ESQ.
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(Appearances continued next page...)

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(Appearances continued next page...)

1 APPEARANCES (Continued)

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1 PROCEEDINGS had before The Honorable Thomas E.
2 Johnston, Chief Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 Thursday, April 25, 2019, at 1:58 p.m., as follows:

5 COURTROOM DEPUTY CLERK: Hi, this is Staci in Judge
6 Johnston's chambers. Who do I have on the line for the
7 plaintiff?

8 MR. S. LONG: Scott Long and Dave Nelson.

9 COURTROOM DEPUTY CLERK: And how about for the
10 defendants?

11 MR. HAFNER: Charles Hafner for Arch Insurance
12 Company, but we are not a defendant.

13 MS. SORENSEN: Colleen Sorensen here for National
14 Union AIG.

15 MR. ROSE: Dennis Rose for Cleveland Cliffs.

16 MR. D'ANNIBALLE: Rob D'Anniballe for National Union
17 AIG.

18 MR. MOON: Cody Moon for Arch Insurance.

19 MR. L. LONG: Louis Long for Great Midwest Insurance.

20 (Pause)

21 COURTROOM DEPUTY CLERK: Hi, it's Staci in Judge
22 Johnston's chambers. Who do I have on the line?

23 MR. BOVE: This is Lou Bove for Zurich, or it is
24 actually American Guarantee and Liability Insurance Company.

25 MR. MAC CORKLE: John MacCorkle for Ken & Coy.

1 COURTROOM DEPUTY CLERK: Hello?

2 MR. WILLIAMS: This is Marc Williams.

3 MR. ROSE: You also have Dennis Rose for Cleveland
4 Cliffs.

5 MR. L. LONG: Louis Long for Great Midwest.

6 COURTROOM DEPUTY CLERK: Kathy, are you on the line?

7 COURT REPORTER: Yes, I am, Staci.

8 COURTROOM DEPUTY CLERK: Okay. Great.

9 If you all hold on just a moment, I will get the
10 judge. Thank you so much.

11 (Pause)

12 THE COURT: Good afternoon. This is Judge Johnston.
13 This is a telephonic status conference in Bluestone versus
14 Pinnacle, civil action No. 2:16-cv-06098.

15 I have in my chambers my law clerk, Lesley Shamblin;
16 my courtroom deputy, Staci Wilson; on the phone, I have court
17 reporter Kathy Swinhart, who is appearing by phone in
18 Huntington.

19 I'm going to start out by asking Bluestone's counsel
20 to note their appearance.

21 MR. S. LONG: Your Honor, this is Scott Long for
22 Bluestone.

23 MR. NELSON: And David Nelson for Bluestone.

24 THE COURT: All right. Next, I'll ask Cliffs to make
25 their appearance.

1 MR. ROSE: Your Honor, Dennis Rose for Cleveland
2 Cliffs.

3 MR. WILLIAMS: And this is Marc Williams for Cleveland
4 Cliffs.

5 THE COURT: All right. Is there anybody on here for
6 Pinnacle?

7 MR. LASOTA: Doug LaSota.

8 THE COURT: I'm sorry. I heard something, but I
9 didn't hear -- please repeat.

10 MR. LASOTA: Doug Lasota.

11 THE COURT: For Pinnacle. All right. Very well.

12 All right. Let's move on to the insurance carriers.

13 Who is on the line -- let's try to have an orderly
14 progression here. But for the insurance companies that are on
15 the line, please note your appearances.

16 MS. SORENSEN: Colleen Sorensen for National Union or
17 AIG. I believe Robert is here as well.

18 MR. D'ANNIBALLE: Yeah, Robert D'Anniballe, Your
19 Honor, for National Union AIG as well.

20 MR. HAFNER: Your Honor, Charles -- I'm sorry.

21 MR. BOVE: Lou Bove for American Guarantee and
22 Liability Insurance Company, sometimes referred to in the
23 papers as Zurich.

24 MR. HAFNER: And then for Arch Insurance Company,
25 Charles Hafner, and my partner Cody Moon is also on the line.

1 MR. L. LONG: This is Louis Long, Your Honor, for
2 Great Midwest.

3 THE COURT: All right. Anybody else on the line want
4 to note an appearance?

5 MR. MAC CORKLE: This is John MacCorkle for Ken & Coy.

6 Your Honor, I was not really sure whether I needed to
7 be a part of this or not. I think we were dismissed from the
8 case and were not participating in the settlement, but I
9 obviously wanted to see whether the Court wanted our
0 participation at this point.

13 MR. MAC CORKLE: Okay. Thank you very much. I
14 appreciate it.

15 THE COURT: Hearing none, you're dismissed.

16 MR. MAC CORKLE: Thank you.

17 THE COURT: You're welcome.

18 Mr. Nelson or Mr. Long, is there anybody else on the
19 call who either was not a part of the settlement or has
20 already paid and fulfilled their obligations under the
21 agreement?

22 MR. NELSON: There is nobody who is -- Target Drilling
23 was dismissed last year, Your Honor. But the parties who are
24 on the phone are everyone that is involved with the one
25 exception of Chubb. We do not have -- that is Chubb ACE. We

1 don't have their contact information. We had requested it a
2 couple of times from their insureds.

3 They are the excess carrier that had committed three
4 million to this settlement. We do not believe that they have
5 indicated any reservation on completing it, but candidly we
6 haven't heard either way from them. But they insure as an
7 excess insurance carrier both Cliffs and ostensibly Pinnacle.

8 THE COURT: All right.

9 MR. BOVE: Your Honor? I'm sorry, Your Honor. This
10 is Lou Bove for American Guarantee or Zurich.

11 The only comment I would have on the participants in
12 the call is that Douglas Lasota, who noticed himself for
13 Pinnacle, he was retained by Zurich as Pinnacle's counsel
14 under reservation. But I would have expected frankly that
15 somebody representing Pinnacle's interests outside of an
16 insurer appointed counsel would be on the call.

17 Pinnacle, of course, is a debtor in the Alabama
18 bankruptcy proceeding but nonetheless may have some interest
19 in this. It's unclear to me at this point whether Pinnacle,
20 as a debtor, is pursuing any claim against any insurer or has
21 anything to say about any insurer's contribution to this
22 settlement, but I just wanted to note that for the record.
23 They're not on the call as best I can tell.

24 MR. HAFNER: And if I may quickly follow up on
25 Mr. Bove's comments. Your Honor, this is Charles Hafner for

1 Arch Insurance Company.

2 Several of the issues relative to Arch's ability and
3 willingness to move forward with the settlement do relate to
4 positions that Pinnacle may or may not be taking, and I don't
5 think Mr. Lasota is the correct person with authority to
6 address those issues. So I certainly share Mr. Bove's
7 surprise and frankly disappointment that there is no one from
8 Pinnacle on the call to address those issues.

9 If Your Honor would like me to get into why, I can,
10 but I certainly want to proceed in the most efficient way.

11 THE COURT: I can assure you that I am not really
12 interested in your disappointment. What I am disappointed in
13 is the fact that this settlement hasn't been consummated by
14 the parties who are not in bankruptcy, including the insurers.

15 The reason for this call is to chart a path forward
16 which if it doesn't -- if there isn't some way to get this
17 resolved in the meantime, everybody is going come back to
18 Charleston, West Virginia, and it's not going to be a pleasant
19 experience.

20 So, Mr. Nelson or Mr. Long, I'll hear from you first
21 since you have a motion pending on this.

22 MR. NELSON: Thank you, Your Honor. This is, for the
23 court reporter, David Nelson.

24 And briefly, Your Honor, I know that you're familiar
25 with this. But for the record, since there is a record being

1 made, it was about a year ago almost today, it was actually
2 May 2nd when we came before the Court trying to get a \$5
3 million settlement with Target resolved. And much to our
4 surprise, that was objected to, and the Court provided the
5 parties with an opportunity to set forth the reasons why they
6 felt that it was perhaps not in good faith. And the Court
7 then proceeded to order -- found that there were -- there was
8 nothing close to a good reason, but yet the plaintiffs had to
9 go through that process.

10 Subsequent to that, we endured a motion asking to
11 compel us to essentially take the \$5 million that had been
12 objected to and spend it on dewatering our own mine so the
13 defendants could inspect it. That consumed frankly a huge
14 part of the litigation retention in the following three and a
15 half months.

16 Finally we got before the Court in October on two
17 months' notice to have this matter settled or have a
18 settlement conference attempted. And plaintiff shows up
19 ready, prepared, and we believe we moved forward and in good
20 faith accomplished a settlement that the Court placed onto the
21 record.

22 Your Honor, much to our surprise, we have found out
23 that in the interim, despite also being frustrated by one of
24 the parties, major parties filing bankruptcy, we found out
25 that apparently there was -- everyone hadn't gotten their act

1 together on the defense side of this matter to determine how
2 much money they actually had available to pay us, despite the
3 fact that we were told clear amounts and relied upon those in
4 completing our settlement and agreeing to it.

5 Your Honor, there are only two things -- Mr. Long and
6 I have spent most of our careers doing defense work. There
7 are only two things you have to get straight on the defense
8 side before going into a mediation, whether you believe the
9 case should be settled and are willing to, and how much money
10 you have to commit to it. Those are two basics.

11 And what we're learning is, in the two months that
12 preceded this, apparently no one had that information, yet
13 specific amounts were offered to us and communicated to us and
14 confirmed on a record.

15 Now about two months after settlement, we learned that
16 somehow those numbers were in dispute, which was astonishing.
17 But frankly because of the bankruptcy, we were powerless to do
18 anything to bring the matter before the Court because we were
19 stayed and prevented. On the first day that we had a chance
20 to bring this before Your Honor, we did.

21 We're extremely frustrated. There are two issues that
22 we see that could possibly be unresolved, but we don't think
23 that either of them have anything to do with us. One of them
24 has to do with a waiver issue or a fee dispute between a
25 putative insured and their insurance carrier over attorneys'

1 fees and defense costs. That has nothing to do with us. The
2 other has to do with whether amounts were still available
3 under an insurance policy that was offered to us. Again, that
4 has nothing to do with us.

5 We simply want to move forward and complete our
6 settlement. And if there is an issue over some sort of
7 confusion about attorneys' fees between the carrier and their
8 insured, that issue -- we actually spent about \$90,000 in
9 Alabama to ensure that that issue could come before Your Honor
10 so that it could be fairly and equitably treated by a court
11 with awareness of the issue rather than the Alabama court.
12 But that issue is not our issue. We want our settlement
13 enforced.

14 THE COURT: An understandable request.

15 Who on the other side wants to speak first?

16 MR. BOVE: Your Honor, this is Lou Bove for American
17 Guarantee, and I kind of echo Mr. Nelson's and Mr. Long's
18 sentiments here.

19 Just for the record, my client Zurich, American
20 Guarantee was the principal payer in the Target settlement,
21 and we were frustrated by what we thought were frivolous
22 objections to our efforts to resolve our insured's, which is
23 Target, exposure in this case, but thankfully we got through
24 that process.

25 Then we appeared before Your Honor for the two days in

1 the mediation in October. We came with every penny we had
2 left under our policy, and we offered it. I have a check here
3 for a million dollars. It's been sitting on my desk ready to
4 pay to Bluestone. All I need is a release, and Bluestone
5 agrees with me that's all I need, and they can have their
6 check.

7 I also helped them, frankly, get through the
8 bankruptcy case and spent a fair amount of money of my -- my
9 client's money doing so so that we could get ourselves out of
10 the bankruptcy court, so I could pay my -- the remaining
11 limit, a million dollars of my policy to Mr. Nelson and
12 Mr. Long as quickly as humanly possible.

13 And I will let them speak to this, about my
14 cooperation and my client's cooperation both in the Target
15 settlement and in this Pinnacle settlement. This has nothing
16 to do with Zurich. All we want to do is close our file
17 frankly, and we've been trying to pay this million dollars
18 since October.

19 So that is -- we have nothing to do with this dispute,
20 but I'll let Mr. Nelson and Mr. Long confirm that for you.

21 MR. NELSON: Your Honor, Mr. Nelson speaking. We can
22 confirm that.

23 MS. SORENSEN: This is Colleen Sorensen for National
24 Union.

25 We filed a written response that kind of explains what

1 is going on from National Union's perspective. Basically
2 there are multiple parties claiming a right to one set of
3 policy limits, and National Union is willing to pay whoever
4 the correct party is, but it would like guidance on who to pay
5 at this point.

6 THE COURT: Let me just step in at this point. I
7 started to say something, but I had my phone on mute.

8 By the way, and I should have said this in the
9 beginning, two things. One is make sure you identify yourself
10 when you speak because there's a lot of people on the call,
11 and it helps me and the court reporter. Number two, if you're
12 not speaking, put your phone on -- excuse me -- put your phone
13 on mute because we don't want to hear you tapping on your
14 keyboard or whatever else you might be doing in the
15 background.

16 Excuse me. I'm recovering from a bad bout of allergy.

17 A couple comments already. Number one, and this is
18 the most important one, you pay your money, you get your
19 release, you're out of the coming festivities, period. So get
20 it done if you can. And if there's not a problem, then I
21 don't see why it's not happening today.

22 Number two, if the excuse for why you haven't done
23 that is we don't know who to pay, that's ridiculous, too.
24 Just get it done. That's not hard to figure out. Everyone
25 needs to be working together on that. So I want to narrow

1 this down to the real problems and getting the non-Pinnacle
2 part of this settlement done.

3 So who else has something to say?

4 MR. ROSE: Your Honor, Dennis Rose for Cliffs.

5 I believe, one, Cliffs had committed at the settlement
6 to pay a million dollars. They have the million. We're ready
7 to pay for the release. The issue is the payment of the AIG
8 policy, which was the policy that insured Pinnacle and Cliffs.

9 You may recall, and our papers say this, that when we
10 were at the settlement, that policy is a fronting policy which
11 means that the money that gets paid is ultimately Cliffs'
12 money.

13 When we were at the settlement, and the record is
14 clear, when Mr. Berman, who was the one who was principally
15 negotiating this, put on the record that number of 2.9, he
16 clearly said the balance of the policy. It is a wasting
17 policy, which means every dollar that was spent on defense
18 cost is going to lower the amount that is available for
19 indemnity.

20 There -- as Mr. Nelson recited, there was significant
21 activity, much of which was caused by actions of Pinnacle and
22 their lawyers during the 50 to 75 days beforehand in which
23 there are significant defense costs that eroded.

24 Our position is there is a gap that exists between
25 whether plaintiff should receive \$2.1 million or whether they

1 should receive the balance of the policy that was available at
2 that time. We have no idea what number was told to
3 Mr. Nelson, we certainly didn't tell anything to them, but we
4 knew that they were going -- we were going to pay -- AIG was
5 going to pay the balance of the policy, which ultimately was
6 going to come out of Cliffs' pocket.

7 We want to get it done as well. We believe there is a
8 settlement, it should be done. We've been working with them
9 at least on getting a settlement agreement that would deal
10 with this issue. But we do believe that Bluestone, when they
11 sat there and they knew the policy terms, they had a policy,
12 they knew it was a policy that wasted for attorney fees. They
13 knew that they were told they were going to get the balance of
14 the policy, not a number certain, the balance of the policy.
15 And they didn't say we need to confirm we're going to get 2.9
16 million, not some number that is less than 2.9 million. I
17 think everyone in that room knew it was less than 2.9 million.

18 AIG is ready to pay the balance of the policy as
19 agreed. Cliffs is ready to pay. And if Bluestone wants to
20 accept that, it's over today.

21 THE COURT: Anybody else have anything to say?

22 MR. HAFNER: Yes, Your Honor. Charles Hafner on
23 behalf of Arch Insurance Company.

24 Our contribution to the settlement was \$250,000, but
25 an added term of that was that, in exchange for that

1 contribution, Pinnacle agreed to provide Arch with a release
2 of any defense cost obligations. Arch remains willing to pay
3 that \$250,000. We have no issue with that.

4 But we have been actually unable --

5 THE COURT: All right. I don't know who has got the
6 ice cream truck outside their office, but they need to put
7 their mute button on.

8 All right. Go ahead.

9 MR. HAFNER: Thank you, Your Honor. Just to continue
10 my thought.

11 We have been trying for several months and several
12 weeks following, certainly since there was an agreement to
13 lift the bankruptcy stay as to these -- you know, this portion
14 of the proceedings, to get Pinnacle to sign the release that
15 they promised us in exchange for our contribution, and it has
16 unfortunately been radio silence from them on our efforts to
17 just get that last piece of paper in place.

18 So, you know, again, it was Mr. Berman that agreed to
19 that release in Your Honor's courtroom, not certainly in front
20 of Your Honor, but in discussions between -- private
21 discussions between me and him, that that was an understood
22 term of Arch's contribution. We understandably would like
23 some -- just some written documentation of that. We provided
24 that to them multiple weeks ago and have heard nothing.

25 So I understand Your Honor doesn't want to hear about

1 our frustration, as I indicated earlier in the call, but that
2 is the source of it. So Arch remains willing to proceed on
3 that basis, but only if Pinnacle honors its end of the
4 bargain.

5 MS. SORENSEN: This is Colleen Sorensen for National
6 Union again.

7 I just wanted to echo what Arch's counsel is saying.
8 It was National Union's understanding that it would pay the
9 remaining portion of its limits, that it was endorsing its
10 policy, and that was a condition of settlement, and now
11 Pinnacle has sent out letters demanding two million in defense
12 costs.

13 So I know it sounds silly that we don't know who to
14 pay, but the reality is we have Pinnacle demanding two million
15 from us, Bluestone who wants the settlement they think was
16 promised them, and then a dispute between our insured, Cliffs
17 and Bluestone about the amount that was promised at the
18 settlement, and we just need clarity. Because our payment was
19 conditioned, too.

20 MR. L. LONG: Your Honor, this is Louis Long on behalf
21 of Great Midwest.

22 We were a very small contributor to the settlement.
23 We're prepared to go forward with the settlement even though
24 it was a condition of our payment that we would receive a
25 policy release from Pinnacle. But given Pinnacle's situation

1 and the bankruptcy complication right now, we're prepared to
2 move forward without that release and give Bluestone its money
3 in exchange for a suitable release, which has been in the
4 works for some time now.

5 THE COURT: All right. Well, this is -- again, I'm
6 going to reiterate that to the extent that pieces of the
7 settlement can get done, let's get them done. And I would
8 encourage everybody to cooperate to get that done as quickly
9 as possible.

10 And then I will ask Mr. Nelson to send a letter to the
11 Court with a copy to remaining counsel, including carriers'
12 counsel, indicating to me exactly who is left that hasn't paid
13 on the settlement. In 10 days from today, I want that letter.
14 So you've got 10 days to figure this out. You've had months
15 to figure it out. Now you've got 10 days to get it done if it
16 can get done.

17 So to the extent that it can't be done or won't be
18 done, I offer two thoughts.

19 First of all, when I spend two full days settling a
20 case, those of you who have obligations in this settlement
21 need to know that not only do I think you've made a settlement
22 with Bluestone, you've made a settlement with me, and you need
23 to consider very carefully the representations that were made
24 to the federal court in that process. I don't take lightly
25 back-pedaling when representations are made to me.

1 So we can -- we'll sort this out, but I don't take
2 this situation lightly. And I know that all of the lawyers
3 that came in for the settlement conference are very smart,
4 very experienced, and they should know what they say to a
5 federal judge needs to be something that can be taken to the
6 bank. So I'm just going to share that with you as food for
7 thought.

8 Having said all that, once I receive Mr. Nelson's
9 letter, I'm going to set another conference. And everybody
10 other than Pinnacle, which is in bankruptcy, everybody that
11 hasn't paid the money that they're supposed to pay is going to
12 come to Charleston, West Virginia again. And I suggest you
13 pack a bag for a while because you're not leaving here until
14 we're done with this settlement, except to the extent --
15 except, of course, Pinnacle.

16 Anybody have any questions?

17 Hearing none, Mr. Nelson, I look forward to your
18 letter in 10 days.

19 MR. NELSON: We will get it to you, Your Honor.

20 THE COURT: All right. Very well.

21 I think that it's worth noting that when people say
22 that they are going to pay money, they should pay it. So
23 we'll sort this out at the proceeding that will be coming, and
24 I assure you it would be better for anybody that might receive
25 an invitation to that proceeding that they find a way to get

1 this resolved beforehand.

2 Everyone have a good day.

3 MR. BOVE: Thank you, Your Honor.

4 (Proceedings were concluded at 2:27 p.m.)

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9 CERTIFICATION:

10 I, Kathy L. Swinhart, Official Court Reporter, certify
11 that the foregoing is a correct transcript from the record of
12 proceedings in the matter of Bluestone Coal Corp., et al.,
13 Plaintiffs, v. Pinnacle Mining Co., LLC, et al., as reported
14 on April 25, 2019.

15

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17 June 12, 2019
18 DATE

19 /s/ Kathy L. Swinhart
20 KATHY L. SWINHART, CSR

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